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NO. 943

IN THE

Supreme Court of the United States

October Term 1964

LEROY COOKS, ET AL., *Petitioners*

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case in December.

CITATIONS TO OPINIONS BELOW

The Judgment of the United States District Court for the Southern District of Texas is unreported and is printed in the accompanying Record Certified by the Clerk of the U. S. Court of Appeals Fifth Circuit (R. p. 396). The

Per Curiam opinion of the Circuit Court of Appeals, Fifth Circuit, is in the certified copy of the record (R. p. 433) and is officially reported at 338 F.2d 59 (1964).

JURISDICTION

Judgment of the Circuit Court of Appeals, Fifth Circuit, affirming the judgment of the District Court, Southern District of Texas, was rendered October 19, 1964. Rehearing was denied December 4, 1964 (R. p. 439). The Jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

What facts prove racial discrimination: Whether the facts as proved by Defendants, indicating that No Negro employees were upgraded according to the terms of a memorandum of Agreement between the Defendants Union and Company, for a period of 12 years, though white employees were consistently upgraded during the same period of time is proof of racial discrimination?

Whether in the face of the Company attitude toward upgrading Negroes as exemplified by and communicated to Plaintiffs through its authorized agent, Plaintiffs were required to do more, and prove more, in order to prove racial discrimination in upgrading?

Whether the fact of racial discrimination is proved by the continued failure of the union, after knowledge of the attitude of the company against upgrading Negro employees, to take positive steps to insure upgrading of Negro employees for a period of 12 years, amounted to proof of racial discrimination as condemned by the National Railway Labor Act?

CONSTITUTION OF THE UNITED STATES, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Statutes involved are as follows:

28 U.S.C.A. 1254(1) Courts of Appeals; certiorari; appeal; certified questions.

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods.

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

45 U.S.C.A. 152 (Fourth). Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. 42. U.S.C.A. 1981. Equal Rights Under the Law. All persons within the jurisdiction of the United States shall have the same right in every state and territory

to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Plaintiffs are Negro employees of the Defendant Texas and New Orleans Railroad Company, hereinafter sometimes referred to as T & N O, who filed their petition in the United States District Court for the Southern District of Texas, Houston Division, against said T & N O, and Defendants Local No. 991 and Local No. 783 (R. p. 15) of the Brotherhood of Railway Carmen of America, and the Brotherhood of Railway Carmen of America, alleging in their complaint certain acts of racial discrimination on the part of Defendants in denying to them certain promotional or "upgrading" rights as shall hereinafter appear. The gravamen of the complaint is and the facts proved show that on February 4, 1943 Defendants negotiated a collective bargaining agreement, which they designated a Memorandum of Agreement, effective March 1, 1943, and provided a means whereby employees of the carmen-helper classification could for a period of time be "set-up" temporarily to the classification of car inspector, or carman or mechanic as the job is referred to alternately. The agreement also contemplated that after the employee had accrued the required number of hours as a temporary carman he would then be placed by the company on the permanent roster of carmen. The period of time crucial to this lawsuit is the period from 1943, when the aforesaid Memorandum of Agreement was negotiated and the year

1955, when the first Negro of Carmen helper classification in the terminal was promoted. That is, Plaintiffs' complaint reduces itself, in part, to complaining that none of them who were employed by the Defendant Railroad at its Houston Terminal as carmen-helpers were "set-up", or upgraded under such Memorandum of Agreement of 1943 until 1955, solely and because they were members of the Negro race; though, they have alleged and proved, during the same period, white employees in the Houston Terminal, of the classification of Carmen-helper *were* upgraded to carman or car inspector or mechanics. This racially discriminatory policy on the part of the company and the union, of setting up only white employees during the period aforesaid (a fact, as the evidence proved, accomplished with the cooperative efforts of the Brotherhood and T & N O) resulted in many white employees gaining permanent carman seniority before plaintiffs, though their initial hiring date was prior to the initial hiring date of many white employees. Plaintiffs in their attempts at availing themselves of the opportunities of employment advancement offered by the Memorandum of Agreement, after becoming aware that they were being systematically and continually being passed over in the upgrading practice, went both to the local chairman of their colored segregated local union and to the T & N O through the division car foreman. From neither source did Plaintiffs get satisfaction of their demands. Plaintiffs were only upgraded in the year 1955 when a sudden and unusual demand for carmen, produced by some changes in T & N O's operations, necessitated the filling of the demand for carmen from a source (negroes) not theretofore used at the Houston Terminal.

As a companion allegation, Plaintiffs averred defendants concealed the nature of said Memorandum Agreement from them and failed in their statutory duty in this regard.

For these acts of racial discrimination the Plaintiffs ask declaratory relief, and relief by way of damages and permanent injunction. After the case was called for trial the Court, pursuant to appropriate stipulation of the parties, entered its order severing the issue of racial discrimination vel non from all other issues arising under the pleadings, and pursuant to said order and stipulation the parties went to trial on the issue so severed (R. p. 426). Trial was had to the Court without the intervention of a jury. The Court subsequently made findings of fact and conclusions of law upon which judgment was entered favorable to Defendants. Jurisdiction of the U.S. District Court was based on 28 U.S.C.A. 1331 and 28 U.S.C.A. 2201, being a case arising under the constitution laws and treaties of, the United States where the amount in controversy exceeds $10,000, and praying for declaratory relief.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by the U. S. Supreme Court. This is so because the Circuit Court of Appeals has decided that the evidence adduced by Plaintiffs at the trial in the District Court was not sufficient to establish racial discrimination in upgrading procedures practiced by the Defendants union and Railroad, and that the findings made by the said trial court of no racial discrimination, against Plaintiffs, are supported by the sufficient evidence. Thus the important

question of federal law is, what evidence is sufficient to establish racial discrimination in upgrading practices adhered to by a union and railroad, under a complaint charging breach of duty to represent fairly and impartially under the National Railway Labor Act? — Stated another way, when should a finding of no racial discrimination, made by a District Court, be set aside as not supported by the evidence, in a case charging racial discrimination in upgrading practices?

A determination of this important question of federal law is necessary for the proper administration of the National Railway Labor Act. No guidelines have been set previously by this Court.

This Court first determined in *Steele v. Louisville and Nashville Railroad Company*, 325 U.S. 192 (1944) that in virtue of 45 U.S.C.A. 152 (fourth), which gives exclusive bargaining authority to the representative selected by a majority of the Craft, the representative so selected had a duty to represent all, including the minority, members of the class, and to refrain from discriminating against said minority members as well as protect them (the minority) from discrimination.

This Court indicated in *Conley v. Gibson;* 355 U.S. 41 (1957), that the federal district Court's jurisdiction had been properly invoked by Negro Employees who sued their local Union for breach of its statutory duty toward them by not protecting them against threatened discharge (a number of Negro employees of their craft had been discharged), while no white employees had been discharged.

These cases prescribe the duty of the union, as well as the liability of the carrier, and in so doing they determine,

for the most part, that minority employees' charges of racial discrimination are matters within the jurisdiction of the federal district courts.

Though there is little indication from authorities decided by the Court relative to evidence sufficient to establish racial discrimination in upgrading, the Conley Case does establish some discernable criteria. There the Court said:

> ". . . Here the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in Steele and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with the active or *tacit* consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."

In the case at bar the allegations are in all things similar: that the Railroad refused wrongfully to upgrade Negro Employees (R. p. 295); that the union refused them protection in this upgrading and refused to help them with processing grievances (R. p. 29); that the white employees were upgraded according to the terms of the agreement. Proof of these allegations, this Court said in *Conley*, Supra, establishes a manifest breach of the Union's Statutory duty. The record shows how, over the alleged number of 12 years, the company wrongfully, refused to upgrade Plaintiffs (R. pp. 28, 93, 191, 192) and there is scarcely a shred of evidence to the contrary. The record shows abundant evidence of the refusal of the union to process the grievances of these Negro emplovees (R. pp. 28, 29, 32, 94, 95, 96, 150, 151, 152, 153, 154) and for no other fathomable reason save the fact that they were negroes. For if in fact it had been for reasons of lack of qualifications, defendants had every opportunity to make that fact abundantly clear in the record. They did not. Negro Plaintiffs were disqualified by their race long before the opportunity to qualify for performance in the jobs was offered them. No issue is made by the Defendants that no white employees were upgraded under this agreement during this twelve year period. If as this Court has said, collective bargaining is a continuing process, involving day-to-day adjustments, and the protection of employee rights already secured by contract, then the failure of the defendant union in this respect is amply demonstrated from the record. The right secured by contract was the right to be upgraded under the memorandum of agreement of 1943.

The Equal Protection Due Plaintiffs:

The concept of equal protection of the laws is essentially the fountainhead of constitutional American government.

Clearly enjoined against the state governments by the 14th Amendment, it has no less a clear and unimpeachable status as a fundamental right guaranteed by the federal government. To this end Congress early *enacted* legislation.* In the *Steele* case, Supra, this Court recognized the fact that Plaintiffs were entitled, at the hands of the union, to equal protection of the laws: "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."

Boling v. Sharpe, 347 U.S. 497 (1954) establishes these propositions: That while due process of law under the 5th amendment and equal protection of the laws under the 14th are not synonymous they are not mutually exclusive; that equal protection is the more "explicit safeguard; that both may enjoin the same kind of unjustifiable discrimination (as in segregation in public education); liberty means not only "freedom from bodily restraint but "the full range of conduct which the individual is free to pursue." Hence, the logic of Plaintiffs' contention is unassailable, that if the 14th Amendment prevents the racially discriminatory practice of systematically excluding Negroes from juries, the 5th amendment prevents the union from engaging in like racially discriminatory activity, the systematic exclusion of Negroes from participating in the upgrading

*42 U.S.C.A. 1981 "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws . . . for the security of persons and property as is enjoyed by white citizens. . ."

procedure provided for all employees by agreement between the railroad and union. Indeed, Mr. Justice Murphy in a concurring opinion in the *Steele* Case, Supra said "I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would violate the constitutional rights of individuals.

The question can best be presented therefore in illuminating detail by examining that line of cases dealing with equal protection of the laws in fact situations where proof of racial discrimination is most analogous to racial discrimination in employment relations.

Equal protection of the laws has been more fully developed under the 14th amendment as a protection against state action. This being true, an examination of the implementation of the safeguard in these cases can best shed light here. What, therefore, proved to be racial discrimination and a denial of equal protection in those cases will illustrate that the practices carried on by union and railroad as proved by Plaintiffs in this case are also racial discrimination. The cases which offer the clearest analogy are those dealing with discrimination in the selection of juries.

Racial discrimination in employment, it is believed, cannot be looked at as an isolated phenomenon when trying to determine by what items of evidence a Plaintiff must establish racial discrimination. The cases dealing with Jury Discrimination offer great illumination. In *Smith v. Texas*, 311 U.S. 128 (194) the defendant Negro raised the issue of denial of the equal protection of the laws in a suit in which he was indicted for rape, alleging syste-

matic exclusion of members of this race from the grand-jury. The proof of racial discrimination was as follows: from 1931 through 1938 of 384 grand jurors who served in Harris County, Texas only 5 were Negroes; that when any of the names of negroes were on a 16 man jury list, the name of the negro was last, with the names of the first 12 being chosen. The Court found the record amply supported racial discrimination despite protestations by the commissioners that none was intended or practiced. This Court said:

> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service."

and further:

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

Again in *Cassell v. Texas,* 339 U.S. 282 (1950), this Court, "Since the result reached may deny a federal right. Re-examin[ed] the facts to determine whether petitioner . . . sustained by proof his allegation of discrimination." Plaintiff contended that Dallas County grand-jury commissioners for 21 consecutive lists had consistently limited Negroes selected to grand-jury service to not more than one on each grand jury. In short, such proportional representation of races on juries was condemned. "The constitution requires only a fair jury selected without regard to race." Under the Texas statutes certain qualifications exist for jury service just as defendants contended is the case with re-

spect to upgrading of negro employees in the instant case. Commissioners testified they knew no available Negroes, for the period specified, who qualified. Of this the Court said:

> "An individual's qualifications for grand jury service, however, are not hard to ascertain, and with no evidence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the statutory requirements of jury service."

In the case at bar, it can likewise be said that when Plaintiffs presented themselves for upgrading, if it were a matter of qualifications exclusively, the Defendants had every opportunity to prove that this fact alone made Plaintiffs ineligible for upgrading.

In *James Avery, Petitioner v. State of Georgia*, 345 U.S. (1953) it is said:

> "And in view of the case before us, where not a single Negro was selected to serve on a panel of sixty—though many were available—we think that Petitioner has certainly established a prima facie case of discrimination.
>
> "The Court below affirmed, however, because Petitioner had failed to prove some particular act of discrimination by some particular officer responsible for the selection of the jury; and the State now argues that it is Petitioner's burden to fill this 'factual vacuum.' We cannot agree. If there is a 'vacuum' to fill it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination . . . When a prima facie case of discrimination is presented, the burden falls, forthwith, upon the state to overcome it. The state failed to meet this test."

Of course, in the case at bar the Plaintiffs went further to prove racial discrimination by proving particular acts of omission and commission of particular agents of both defendants which, under this test, surely go beyond the establishment of the prima facie case outlined above. *Pete Hernandez, Petitioner v. State of Texas* 347 U.S. 475 (1954) also applied this "rule of exclusion" in the selection of jurors to one of Mexican ancestry.

Other cases deciding that racial discrimination in systematic exclusion of Negroes from juries is a denial of equal protection, are—*Amos Reece, Petitioner v. State of Georgia,* 350 U.S. 85 (1956); *United States of America ex rel. Robert Lee Goldsby v. William Harpole, Superintendent etc.* 263 F.2d 71 (5th Cir. 1959)—"We cannot assume that Negroes, the majority class in Carroll County, had en masse, or in any substantial numbers, voluntarily abstained from registering as electors and, by such action, had rendered themselves ineligible for jury duty."; *United States of America ex rel Seals v. Martin J. Wiman, Warden,* 304 F.2d 53 (5th Cir. 1962).

CONCLUSION

In the employment relation, true, the employee must exercise some initiative and perhaps actually seek the job. This is more likely true than not. Whereas, in the jury selection situations the population awaits selection and ordinarily the excluded juror is not the one who urges the deprivation of the equal protection of the laws. But these minor distinctions aside, it would seem the jury selection cases offer the clearest analogy to the situation presented here where the Plaintiffs were systematically excluded from

participation in the upgrading practice. Defendants make no issue that seniority was a serious determinative issue. They make the argument, however, that qualifications during the 12 year period impeded the Plaintiffs in their upgrading. Though they make no showing that Negro employees "failed" to qualify after presenting themselves for upgrading. Under this Court's authorities just discussed, it would seem defendants have some burden in this regard which they have not met.

It is therefore respectfully requested that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

ROBERSON L. KING
Attorney for Petitioners

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21293

LEROY COOKS, ET AL., *Appellants*

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the Southern District of Texas

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(October 19, 1964.)

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM: The appellants (plaintiffs), a group of twenty-nine employees, sued The Texas and New Orleans Railroad Company (defendant) and Brotherhood of Railway Carmen of America, Local No. 991 and Local

No. 783 (defendants) claiming discrimination against them on account of race with respect to certain rights or opportunities of promotion in their employment. The evidence was fully developed and the trial court made findings of fact and reached conclusions of law contrary to the contentions of the plaintiffs.

It is our conclusion that the evidence supports the facts found, and the legal conclusions reached are correct. The record fails to disclose error.

The judgment is AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21293

LEROY COOKS, ET AL., *Appellants*,

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellees*.

Appeal from the United States District Court for the Southern District of Texas

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(December 4, 1964)

ON PETITION FOR REHEARING

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM: It is ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21293

D. C. Docket No. 12329 — C.A.

LEROY COOKS, ET AL., *Appellants*,

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellees*.

Appeal from the United States District Court for the Southern District of Texas

---

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants Leroy Cooks, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 19, 1964

Issued as Mandate: December 14, 1964